



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[GN Docket No. 12-268 and MB Docket No. 15-137; FCC 15-139]

**Channel Sharing by Full Power and Class A Stations Outside the Broadcast Television
Spectrum Incentive Auction Context**

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this Second Order on Reconsideration, the Federal Communications Commission (Commission) provides more flexibility to broadcasters interested in the channel sharing option in the broadcast incentive auction by clarifying that back-up channel sharing agreements (“CSAs”) are permitted under its rules and providing more time for successful bidders to transition to shared facilities after the auction. The Commission also provides guidance regarding how the CSA exception to the prohibited communications rule applies with respect to back-up CSAs.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Shaun Maher, Shaun.Maher@fcc.gov of the Media Bureau, Video Division, (202) 418-2324.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Second Order on Reconsideration, FCC 15-139, adopted October 21, 2015, in MB Docket No. 15-137. The full text of the Second Order on Reconsideration is available for inspection and copying during regular business hours in the FCC Reference Center, 445 12th Street, SW., Room CY-A257, Portals II, Washington, DC 20554. This document is available in alternative formats (computer

diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

Paperwork Reduction Act of 1995 Analysis: This Second Order on Reconsideration does not contain any additional new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (“PRA”), Public Law 104-13, beyond those that were already in the Commission’s Incentive Auction Report and Order, 79 FR 48442-01 (Aug. 15, 2014) (“Incentive Auction R&O”). In addition, therefore, it does not contain any additional new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, beyond those that were already in the Incentive Auction R&O.

The Commission is seeking separate OMB approval for FCC Form 2100, Schedule B (for a full power station) and F (for a Class A station) and FCC Form 177.

Synopsis:

1. The Commission adopted rules for the broadcast incentive auction in the Incentive Auction R&O including rules for parties interested in entering into CSAs. The Commission recently modified those channel sharing rules to provide greater flexibility to stations considering that option. In this Second Order on Reconsideration, the Commission announces that the availability of back-up channel sharing arrangements would provide additional flexibility for stations considering channel sharing. In particular, it would enable both parties to a CSA to participate in the auction while mitigating the risk that the auction system could freeze both stations in the same round and thus deprive both stations of a post-auction host or “sharer” station. For some, the risk of being left without any spectrum on which to share may be too great and foreclose that kind of participation. The Commission concludes that a back-up CSA could mitigate that risk and encourage greater participation.

2. The Commission clarifies that, if both parties to a CSA participate in the auction, the rules allow either or both parties to also enter into a back-up CSA with one other station in the same DMA to act as the back-up host or sharer station. By allowing the parties to secure a fallback arrangement in the event that both parties relinquish their spectrum usage rights in the auction, this clarification will help promote wider participation in the auction by broadcasters that require assurance that they will remain on the air in the DMA. The Commission reminds parties that all of their auction-related activity and communications, including with respect to back-up CSAs, must adhere to the antitrust laws as well as the rules.

3. In the Second Order on Reconsideration, the Commission rejects the Broadcaster Representatives' request to allow "contingent multi-party CSAs across multiple markets." The Commission concludes that multi-market back-up CSAs are not necessary to address the uncertainty created if multiple parties to a particular CSA participate in the auction. Such a result would undermine the general goal of the rules prohibiting certain communications, which are intended to reinforce existing antitrust laws, facilitate the detection of collusive conduct, and assure incentive auction participants that the auction process will be fair and objective. The Commission restated that it crafted the CSA exception to apply on an agreement-by-agreement basis in order to encourage channel sharing relationships without undermining these objectives.

4. The Commission also clarifies that, consistent with the foregoing, the CSA exception to the reverse auction rule prohibiting certain communications applies only to communications between parties to a single CSA at any given time. Further, the CSA exception only applies to a CSA, including back-up CSAs, if the CSA was entered into and filed with the Commission by the application deadline. If both stations pursuant to the primary CSA have a bidding status of "frozen—provisional winner," i.e., the auction system determines that the station can never be assigned a feasible channel in its pre-auction band in the current stage, then parties to a back-up CSA may communicate regarding bids and bidding strategy and must cease

communication of this type with the party to the original CSA. Prior to that point, the rationale for the CSA exception – that parties to a CSA should be able to “fully engage as various options are presented during the auction process” – is inapplicable with respect to the back-up CSA. Once the relinquishment bid of the prospective host of the CSA is provisionally accepted by the auction system in a given stage of the auction, the CSA exception may be utilized for otherwise prohibited communications involving the parties to the back-up agreement, and can no longer be utilized for parties to the primary agreement in that stage.

5. The Commission notes that under the reverse auction bidding procedures, the bidding status of a “frozen—provisional winner” may change to “bidding in the current round” if the auction enters a subsequent stage. Accordingly, if the host in the primary CSA, which was no longer operative because its bidding status became “frozen—provisional winner” in the previous stage, is designated as “bidding in the current round” in a subsequent stage of the auction, and that CSA expressly provides that it becomes the operative sharing agreement under such circumstances, the host may notify the sharee in the primary CSA of that change in status and the CSA exception will again apply to communications between the parties to the primary agreement rather than with the back-up host.

6. The Commission also finds that the attractiveness of the channel sharing option would be enhanced if sharees were given additional time to plan and execute their transition to the host’s facilities. Currently, the rules require that all winning go off-air bidders in the reverse auction, including winning channel sharees, must terminate operations on their pre-auction channels within three months of when they receive auction proceeds. While three months for termination of operations is sufficient for go off-air winners who intend to relinquish their licenses and cease broadcasting altogether, the Commission recognizes that winning bidders that plan to share a channel will remain in operation and may therefore need more time to implement the move to the sharer’s facility. For instance, a channel sharee may need time to deal with

technical issues associated with transitioning to its shared location. If it is changing its community of license, it may also need to negotiate modifications to carriage agreements or finalize new must-carry arrangements with multichannel video programming distributors.

7. For these reasons, the Commission modifies section 73.3700(b)(4)(ii) of the rules to extend the amount of time a sharee in a pre- or post-auction CSA will have to relinquish its pre-auction channel to six months after receipt of its reverse auction proceeds. As the Commission decided in the Incentive Auction R&O, winning channel sharing bidders may request a waiver of up to an additional three months to cease operations on their pre-auction channel, pursuant to section 1.3 of the rules, and the Commission will view these requests most favorably. Further, winning channel sharing bidders may request an additional three-months, and the Commission will view the additional requests favorably as well so long as it determines that grant of the extension will not delay the post-auction transition. The Commission finds that this extension of the transition period to six months, and the availability of waivers of up to an additional six months, is unlikely to adversely affect the Commission's post-auction transition timeline.

Initial Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the U.S. Small Business Administration (SBA).

In 2012, Congress mandated that the Commission conduct an incentive auction of broadcast television spectrum as set forth in the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”). The incentive auction will have three major pieces: (1) a “reverse auction” in which full power and Class A broadcast television licensees submit bids to voluntarily relinquish certain broadcast rights in exchange for payments; (2) a reorganization or “repacking” of the broadcast television bands in order to free up a portion of the ultra-high frequency (“UHF”) band for other uses; and (3) a “forward auction” of licenses for flexible use of the newly available spectrum. In the Incentive Auction R&O, the Commission adopted rules to implement the broadcast television spectrum incentive auction. Among other things, the Commission adopted rules for broadcast stations that choose to channel share. Pursuant to the RFA, a Final Regulatory Flexibility Analysis (“FRFA”) was incorporated into the Incentive Auction R&O.

This Second Order on Reconsideration reflects clarifications and modifications to the Commission’s rules arising in response to comments filed by Fox, ION, Tribune, and Univision (the “Broadcaster Representatives”). The Commission generally responds favorably to the Broadcaster Representatives’ requests, finding that providing these clarifications will increase broadcasters’ flexibility to use the channel sharing bid option and will make the option more attractive. Specifically, this Second Order on Reconsideration clarifies the Commission’s rules to permit broadcasters to enter into back-up channel sharing agreements (“CSAs”) with an additional partner to mitigate the risk that stations that intend to channel share could be left without spectrum after the auction, if both partners receive a status of “frozen-provisionally winning” in the same round of the reverse auction. The Commission also clarified that the CSA exception to the general prohibition on communications regarding bids and bidding strategy will apply to that back-up CSA, so long as the back-up CSA was filed before the application deadline, is the requirement for all CSAs. This Second Order on Reconsideration also permits back-up agreements based on price or other contingencies, but declines to extend the CSA exception to

them as introducing unacceptable risk of becoming a vehicle for collusion. Finally, this Second Order on Reconsideration extends the transition period for channel sharing winning bidders from three months to six months, and extends the possibility for additional waivers from three months to six months, barring any delay this would cause other transitioning broadcasters.

Neither of these changes adopted in this Second Order on Reconsideration will impose additional costs. The changes provide greater flexibility for both stations that wish to pursue channel sharing agreements pre-auction and those that become channel sharing stations post-auction. Therefore, the Commission certifies that the changes adopted in this Second Order on Reconsideration will not have a significant economic impact on a substantial number of small entities.

The Commission will send a copy of the Second Order on Reconsideration, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act. In addition, the Second Order on Reconsideration and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.

Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

None.

List of Subjects in 47 CFR Part 73

Television and reporting and recordkeeping requirements.

FEDERAL COMMUNICATIONS COMMISSION.

Marlene H. Dortch,
Secretary.

Final rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73 – RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336 and 339.

2. Section 73.3700 is amended by revising paragraphs (b)(3) and (b)(4)(ii) to read as follows:

§ 73.3700 Post-incentive auction licensing and operation.

(b) ***

(3) License applications for channel sharing stations. The licensee of each channel sharee station and channel sharer station must file an application for a license for the shared channel using FCC Form 2100 Schedule B (for a full power station) or F (for a Class A station) within six months of the date that the channel sharee station licensee receives its incentive payment pursuant to section 6403(a)(1) of the Spectrum Act.

(4) ***

(ii) The licensee of a channel sharee station and a licensee of a license relinquishment station that has indicated in its Form 177 an intent to enter into a post-auction channel sharing agreement must comply with the notification and cancellation procedures in § 73.1750 and terminate operations on its pre-auction channel within six months of the date that the licensee receives its incentive payment pursuant to section 6403(a)(1) of the Spectrum Act.

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